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CHARLES ELMORE C

In the

Supreme Court of the United States

October Term, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation,
GENERAL BAKING COMPANY, a corporation,
SCHULZE BAKING COMPANY, a corporation, and
CARL WILKE, doing business as the WILKE BAKING COMPANY, *Appellants,*

vs.

HARRY H. WOODRING, as Governor of the State of Kansas, ROLAND BOYNTON, as Attorney General of the State of Kansas, JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL as members of the Public Service Commission of the State of Kansas, *Appellees.*

APPELLANTS' STATEMENT AS TO JURISDICTION ON APPEAL.

(Filed pursuant to Rule 12.)

CHARLES R. WILKE,
JOHN C. GROVER,
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MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938 (United States Code, Title 28, Section 345), provides that Section 238 of the Judicial Code is amended to read in part as follows:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * * * *
>
> (3) Sec. 380 of this title."

Section 380 of said Act, being Sec. 266 amended of the Judicial Code, reads in part as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of

said three judges shall concur in granting such application. * * *

An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * *

The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 6th day of January, 1932, (R.* 55).

The application for appeal was presented on the 9th day of January, 1932, (R.* 55).

C.

Nature of Case and Ruling Below.

This is an appeal from the decision of a statutory three judge court, convened in the United States District Court for the District of Kansas, First Division. The 1931 Legislature of Kansas enacted a law known as Chapter 236 of the Laws of Kansas, 1931, and entitled "Relating to Motor Carriers and to Transportation thereon over the Public Highways." This Act was duly

*All references to the record are to the pages of the certified unprinted record prepared by the clerk of the District Court for the District of Kansas, First Division, and on file with the clerk of this Court. The record has not yet been printed.

approved March 16, 1931; published May 28, 1931, and took effect on July 1, 1931.

The petitioner, Continental Baking Company, is a Delaware corporation, with its principal place of business in New York City; petitioner, General Baking Company, is a New York corporation, with its principal place of business in New York City; petitioner, Schulze Baking Company, is an Illinois corporation, with its principal place of business in the City of Chicago, Illinois, and Carl Wilke is an individual operating as the Wilke Baking Company in Beatrice, Nebraska. All of the petitioners are engaged in the general baking business.

On the 21st day of September, 1931, petitioners filed a bill of complaint in the United States District Court for the District of Kansas, First Division, at Topeka, in which Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas, and Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell as members of the Public Service Commission of the State of Kansas, were made defendants (R.* 3-22). In petitioners' bill of complaint they allege that Chapter 236 of the Laws of Kansas, 1931, discriminates against them and violates and abrogates the rights and privileges guaranteed to them by the Constitution of the United States, and particularly Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the exemption from the provisions of said Act in Section 2 thereof, of (a) motor carriers who shall operate wholly within any city or village of the state; (b) private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city, or any village; (c) the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own

motor vehicle; (d) the transportation of children to and from school, is arbitrary, discriminatory and void.

Section 2 in conjunction with the other sections of the Act is unconstitutional in that it fails to define with a sufficient degree of certainty the obligation the State imposes upon petitioners.

Section 5 of said Act subjects private motor carriers of property to the same regulations imposed upon common carriers and gives to the Public Service Commission of the State of Kansas powers far in excess of those authorized by the Constitution of the United States.

Section 21 of said Act in requiring liability insurance exempted certain enumerated carriers in Section 2; Section 21, in providing that no other or additional bonds or licenses than those prescribed in this Act shall be required of any motor carrier by any city or town or other agency of the State.

That Section 2 of said Act subjected private motor carriers of property to the same regulations as common carriers, and that the whole of said Act attempted to regulate commerce in violation of Article I, Section 8, par. 3 of the Constitution of the United States, in depriving them of their property without due process of law, and denying them equal protection of the law, and in abridging the privileges and immunities of citizens of the United States. Also that said Act violates Article I, Section 8, paragraph 3 of the Constitution of the United States delegating to Congress the exclusive power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Also Article 4 of Section 2 of the Constitution of the United States in denying them the privileges and immunities guaranteed by the Constitution.

Petitioners prayed that the Act be declared unconstitutional, a temporary restraining order be issued, a final injunction issued, and for such other and further proper relief that may to the court seem just and proper (R.* 14).

On the 22nd day of September, 1931, a temporary restraining order was signed by the Honorable Richard J. Hopkins, District Judge (R.* 22), and on the same day bond fixed, approved, executed and filed (R.* 24), and on the 24th day of September, 1931, defendants filed a motion to dismiss (R.* 26), and on the 29th day of September, 1931, defendants filed a request for the convening of a statutory three judge court (R.* 27) to which petitioners consented (R.* 28), and on the 2nd day of October, 1931, an order was made convening said court, fixing the time for hearing as of October 10, 1931, at Topeka, and convening and designating George T. McDermott, Circuit Judge; Franklin E. Kennamer, District Judge; and Richard J. Hopkins, District Judge, as the statutory three judge court to hear the case (R.* 29).

On the 24th day of September, 1931, defendants served and filed notice of hearing (R.* 27); on the 3rd day of October petitioners served and filed notice of hearing (R.* 30); and on the 10th day of October, 1931, the case was heard by the aforesaid statutory three judge court, and taken under advisement, with an order continuing the restraining order and bond (R.* 30½). On the 15th day of December, Judge McDermott handed down a memorandum opinion concurred in by Judge Hopkins, upholding the constitutionality of the Act, dismissing petitioners' bill of complaint, dissolving the temporary restraining order (R.* 31), and a dissenting memo-

randum by Judge Franklin E. Kennamer, dissenting, holding that the Act was unconstitutional and violated the law as last declared by the Supreme Court of the United States in the case of *Smith* v. *Cahoon,* 283 U. S. 553 (R.* 54).

On the 6th day of January, 1932, the statutory three judge court for the District Court of the United States for the District of Kansas, First Division, entered the decree dismissing the bill of complaint of petitioners, dissolving the temporary restraining order heretofore issued, and denying petitioners the relief prayed (R.* 55). On the 9th day of January, 1932, petitioners duly served and filed their petition for appeal (R.* 55), assignment of errors (R.* 56), and prayer for reversal (R.* 61). On the 9th day of January, 1932, Judges George T. McDermott, Franklin E. Kennamer and Richard J. Hopkins made an order allowing the appeal (R.* 62), and fixing the bond at five thousand ($5,000.00) dollars, the bond to act as a supersedeas (R.* 62).

On the 9th day of January, 1932, petitioners' bond was approved and filed (R.* 63, 65) and on the 9th day of January the petitioners duly filed and served the citation for appeal (R.* 1), and on the 9th day of January, 1932, petitioners duly served and filed their præcipe (R.* 66), and on the 3rd day of February, 1932, petitioners' appeal was duly filed with the clerk of the Supreme Court of the United States and docketed as No. 677.

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this court are believed to sustain jurisdiction of this appeal:

Clark v. *Poor*, 274 U. S. 554.
Smith v. *Wilson*, 273 U. S. 388, 391.
Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320.
Ex parte Buder, 271 U. S. 461, 464, 465.
Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196, 206.
Shaffer v. *Carter*, 252 U. S. 37, 44.

We respectfully submit that this court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

CHARLES R. WILKE,
JOHN C. GROVER,
Counsel for Appellants.